

met w/ Beverly
9-8-16

(C) 815 915 6290

Julia Eckmeier

bevk-sam
@yahoo.com

Beverly Schneider - Princeton, IL - married 47.5 yrs.
- Both business owners in Princeton

Known Julia for ~ 13 years gonevtake.

Modeling - known - ~ 2 years.

- Watch her - 2-3 x / mo. - w/o Julia
- 1 overnight

- See her Mod 1-2 x / wk.

- Calls her "Grandma Beverly"

July 11, 2016

without protection

where does

hanging in fog - Demonstrating sexual behavior

Touching other men

Erkmeier 7/26/16

Counter - Petition for non-visits?

Petition for Rule -
DRUG TEST

215 Exam - they suggest Jane Valency > File motion
- Respond w/ Sex offender eval. +
Response.

Kevin:
Uncle has schizophrenia

Uncle "messes w" Julia when she stayed there

Hearings of 3-year-old

Juvenile Court det.

Beverly no:

815 915 6298

- August 31 - Trial - 9:30

- Criminal Interference w/ U-bater

Beverly - owns L.W. Schneider.

RULE 237 - WITNESSES. -

DEFS - website - signs + symptoms of sexual abuse. ^{DISCOVERY}
↓
Cross Exam

Hearings - contempt

215 Exam

- ordered when health is in controversy
- most probative evidence
- The crux of this case is whether this abuse is happening.
 - Her M.H. v. Abuse. - Abuse is very difficult to prove.
- Abuse very difficult to prove.
- He is getting visitation

OP - Kevin's

- Need time to respond.
- unusual OP.
- Need a lot of witnesses and evidence.

OP - Julia's

- Willing to dismiss
- Would rather continue
- Clearly she is sincere. We must find out if she is right.

Contempt + Visitation Abuse

- offer make-up visitation
- Counseling is an appropriate remedy per new 607.6 -
Effective 1/1/17 - P.A. 99-763
- Suspicious would hamstring her. Couldn't get groceries. Work. Come to court.

Motion Strike Affidavit

- Did not live together much
- Hearing. Incompetent to testify. Speculation of state of mind.

Continuances

- Discovery needed more.
- Response some

1. Strike right of first refusal.

2.

215 + Motion to Strike

-

- Not competent

- * - Need amended 215 exam
- grant 215 - Beh
- deny motion to strike.
- need proposed order.

Den 215

- Disclosure of sexual abuse to herself
 - not otherwise admissib
 - affecting well-being.
- Child therapy
 - write a report - give opinion
 -
- Sooner than later

unfounded -

- "scientifically impossible"

-

* 215 - leave to file amended motion

* for .

C.V. - Dr. parent @
parent and
associates...

Credence 9/1/16

2013 - 315 Herbert St. - Penn - Both lived there, after M.
- Kevin relayed to Julia that "spirits possessed" him
and controlled his body" causing him to threaten
to kill Julia and strike him.

laying in bed.

- Prompted conversation b/w Julia + his mother
regarding this + after outburst. Kevin's
mother said she was afraid that like his
uncle Michael he as well has the genetic
illness of schizophrenia that runs in her family.

- She said she believes Kevin should enter
into counseling.

- Mom said she believed he was schizophrenic.
They sat together + researched the disease.

- 1st OP - see this doc.

- Kevin said "I'm going to fucking murder you,
chop you body up + piss, and scatter it all
over [Fred's] house"

This happened

transcript
Need OP still to complete
this part

Bundy
8/5 9/15
6292
Pall transcribe

~ June 19, 2014

- Julia brought M. to Kevin's work. M. bumping K.'s leg. Moments later, K indicates he needed to leave shortly. M. said she wanted to go to K's house + play w/ his snake. I asked K if he had a ^{toys} snake, K says no.

at home
his parents house.

~ June, 2014

- At Tina Kohn's office, Gordon waited in car. Gordon says that M. said, "Daddy + Gma + Gpa touched her crotch. Gordon will you touch my crotch."

- Madeline has made several disclosures to Julia

- One time K called J (after sexual touching) asking whether she was "still cool", and said "I understood if you don't want me to take her"

- M. masturbates since 7 mos. old.

- After repeated warning, K. continues to touch ^{M.} her

- Enter DCF's records - see reasons to support abuse.
- Review

VSI - of Madeline

- Wants interview

- Wants credentials of evaluator

- Call Thursday

/.

273 Ill. App. 3d. 81

- Verdict denial

Evidence - Videos.

7-28-14

- Exchange Incident @ Wal-Mart - he drove off w/ her in the car -

- Wal-Mart in Penn - get
- Row 12 10:40 - 11:15

Enter appearance as co-counsel

- Talk to Ed Kulak

DEFS -

60/213.1. Hearsay exception

§ 213.1. Hearsay exception. In an action for an order of protection on behalf of a high-risk adult with disabilities, a finding of lack of capacity to testify shall not render inadmissible any statement as long as the reliability of the statement is ensured by circumstances bringing it within the scope of a hearsay exception. The following evidence shall be admitted as an exception to the hearsay rule whether or not the declarant is available as a witness:

(1) A statement relating to a startling event or condition made spontaneously while the declarant was under the contemporaneous or continuing stress of excitement caused by the event or condition.

(2) A statement made for the purpose of obtaining, receiving, or promoting medical diagnosis or treatment, including psychotherapy, and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment. For purposes of obtaining a protective order, the identity of any person inflicting abuse or neglect as defined in this Act shall be deemed reasonably pertinent to diagnosis or treatment.

(3) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, and (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts.

Circumstantial guarantees of trustworthiness include:

- (1) the credibility of the witness who testifies the statement was made;
- (2) assurance of the declarant's personal knowledge of the event;
- (3) the declarant's interest or bias and the presence or absence of capacity or motive to fabricate;
- (4) the presence or absence of suggestiveness or prompting at the time the statement was made;
- (5) whether the declarant has ever reaffirmed or recanted the statement; and
- (6) corroboration by physical evidence or behavioral changes in the declarant.

The record shall reflect the court's findings of fact and conclusions of law as to the trustworthiness requirement.

A statement shall not be admitted under the exception set forth in this Section unless its proponent gives written notice stating his or her intention to offer the statement and the particulars of it to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

P.A. 84-1305, Art. II, § 213.1, added by P.A. 86-542, § 1, eff. Jan. 1, 1990.

Formerly Ill.Rev.Stat.1991, ch. 40, ¶ 2312-13.1.

Kevin
Kramer

I. Visitation Denial

A. Kevin Kramer

1. Petition for rule to show cause -

a. Paragraph 4 -

- i. False report - unfounded not false
- ii. You also recently filed a report against Julia is that correct?
- did that come back unfounded - False?!
- iii. You state - ~~that~~ that when he has the child Bjornlund calls each time to the Peru police requesting a wellness check.
EVERY TIME!

b. affidavit in support of Rule

i. Paragraph 1 -

- May 8, 2016 - Mothers Day - 2nd of MSA

* go through calendar

ii. In Re Marriage of Patsy Aleschins, 273 Ill App 3d 81

States that a mother's ~~conduct~~ actions denying visitation stemmed from her concern about how the father was treating the children, rather than from an intent to interfere with father's rights. Therefore, the mother's conduct did not amount to willful and unjustified denial of father's visitation rights.

9/1/16

1. Copy of OP (1st) + Petition for OP.
2. Contact Mark Madinger
3. OP transcript (13th)
4. Need date re: "snake" conversation
5. Have Gordon call me re: affidavit.
6. Incident descriptions re: Kevin's inappropriate touching
7. Transcript of contempt hearing
8. Response to Kevin's Petition for OP.

9/19/14

- 1st OP - mostly

Call doctor examining Julia

- Modine

- Janet - call email
- appeal?

4. Kristin Valerye: Past ult records.

5. Gordon - ⁸¹⁵503-0036

~ 607.

6. Police interference w/ DCFS investigation - Slender -
"she is lying?"
- last number or 2

7. Mom reported to Police that Julia was lying.

(750 ILCS 5/607.5)

Sec. 607.5. Abuse of allocated parenting time.

(a) The court shall provide an expedited procedure for the enforcement of allocated parenting time.

(b) An action for the enforcement of allocated parenting time may be commenced by a parent or a person appointed under Section 506 by filing a petition setting forth: (i) the petitioner's name and residence address or mailing address, except that if the petition states that disclosure of petitioner's address would risk abuse of petitioner or any member of petitioner's family or household or reveal the confidential address of a shelter for domestic violence victims, that address may be omitted from the petition; (ii) the respondent's name and place of residence, place of employment, or mailing address; (iii) the terms of the parenting plan or allocation judgment then in effect; (iv) the nature of the violation of the allocation of parenting time, giving dates and other relevant information; and (v) that a reasonable attempt was made to resolve the dispute.

(c) If the court finds by a preponderance of the evidence that a parent has not complied with allocated parenting time according to an approved parenting plan or a court order, the court, in the child's best interests, shall issue an order that may include one or more of the following:

(1) an imposition of additional terms and conditions consistent with the court's previous allocation of parenting time or other order;

(2) a requirement that either or both of the parties attend a parental education program at the expense of the non-complying parent;

(3) upon consideration of all relevant factors, particularly a history or possibility of domestic violence, a requirement that the parties participate in family or individual counseling, the expense of which shall be allocated by the court;

(4) a requirement that the non-complying parent post a cash bond or other security to ensure future compliance, including a provision that the bond or other security may be forfeited to the other parent for payment of expenses on behalf of the child as the court shall direct;

(5) a requirement that makeup parenting time be provided for the aggrieved parent or child under the following conditions:

(A) that the parenting time is of the same type and duration as the parenting time that was denied, including but not limited to parenting time during weekends, on holidays, and on weekdays and during times when the child is not in school;

(B) that the parenting time is made up within 6 months after the noncompliance occurs, unless the period of time or holiday cannot be made up within 6 months, in which case the parenting time shall be made up within one year after the noncompliance occurs;

(6) a finding that the non-complying parent is in contempt of court;

(7) an imposition on the non-complying parent of an appropriate civil fine per incident of denied parenting time;

(8) a requirement that the non-complying parent

*In Re Marriage of Alvin 273 Ill App 3d 81
209 IL Dec 8435 652 NE2 383*

reimburse the other parent for all reasonable expenses incurred as a result of the violation of the parenting plan or court order; and

(9) any other provision that may promote the child's best interests.

(d) In addition to any other order entered under subsection (c), except for good cause shown, the court shall order a parent who has failed to provide allocated parenting time or to exercise allocated parenting time to pay the aggrieved party his or her reasonable attorney's fees, court costs, and expenses associated with an action brought under this Section. If the court finds that the respondent in an action brought under this Section has not violated the allocated parenting time, the court may order the petitioner to pay the respondent's reasonable attorney's fees, court costs, and expenses incurred in the action.

(e) Nothing in this Section precludes a party from maintaining any other action as provided by law.

(f) When the court issues an order holding a party in contempt for violation of a parenting time order and finds that the party engaged in parenting time abuse, the court may order one or more of the following:

(1) Suspension of a party's Illinois driving privileges pursuant to Section 7-703 of the Illinois Vehicle Code until the court determines that the party is in compliance with the parenting time order. The court may also order that a party be issued a family financial responsibility driving permit that would allow limited driving privileges for employment, for medical purposes, and to transport a child to or from scheduled parenting time in order to comply with a parenting time order in accordance with subsection (a-1) of Section 7-702.1 of the Illinois Vehicle Code.

(2) Placement of a party on probation with such conditions of probation as the court deems advisable.

(3) Sentencing of a party to periodic imprisonment for a period not to exceed 6 months; provided, that the court may permit the party to be released for periods of time during the day or night to:

(A) work; or

(B) conduct a business or other self-employed occupation.

(4) Find that a party in engaging in parenting time abuse is guilty of a petty offense and should be fined an amount of no more than \$500 for each finding of parenting time abuse.

(g) When the court issues an order holding a party in contempt of court for violation of a parenting order, the clerk shall transmit a copy of the contempt order to the sheriff of the county. The sheriff shall furnish a copy of each contempt order to the Department of State Police on a daily basis in the form and manner required by the Department. The Department shall maintain a complete record and index of the contempt orders and make this data available to all local law enforcement agencies.

(h) Nothing contained in this Section shall be construed to limit the court's contempt power.

(Source: P.A. 99-90, eff. 1-1-16.)

Testimony of Examining Physician. Either party or the court may call the examining physician or physicians to testify. Any physician so called shall be subject to cross-examination.

Costs and Compensation of Physician. The examination shall be made, and the physician or physicians, if called, shall testify without cost to the parties. The court shall determine the compensation of the physician or physicians.

Administration of Rule. The Administrative Director and the Deputy Administrative Director are charged with the administration of the rule.

History

Amended 6-1-95, eff. 1-1-96; amended 3-28-02, eff. 7-1-02; amended 3-28-11, eff. immediately.

Annotations

Commentary

COMMITTEE COMMENTS

COMMITTEE COMMENT

(March 28, 2011)

Paragraph (d) provides that a trial court may order impartial medical examinations only where the parties have presented conflicting medical testimony, reports or other such documentation which places a party's mental or physical condition "in issue" and, in the court's discretion, it appears that the examination will materially aid in the just determination of the case. Mere allegations are insufficient to place a party's mental or physical condition "in issue."

The impartial medical examiner cannot answer the ultimate legal issues in the case; rather, the examiner can render a medical opinion which can assist in the resolution of those issues.

(Revised June 1, 1995)

This rule is derived from former Rules 17-1 and 17-2. The language of Rule 17-1 was not changed except that the time in which the examining physician shall present his findings has been extended to 21 days in paragraph (c) of Rule 215. Under former Rule 17-1(3) that period was 20 days. Paragraph (c) of the new rule also requires that the physician present his report 14 days before trial. Former Rule 17-1(3) required the physician to present his findings not later than 10 days before trial. These changes are consistent with the Committee's general policy of establishing time periods in multiples of seven days.

Former Rule 17-2 has been revised as paragraph (d) of the new rule, but the substance is not changed, except that the provision is no longer limited to personal injury cases.

This rule is intended to provide an orderly procedure for the examination of civil litigants whose physical or mental condition is in controversy. Originally, the rule concerned only physicians. The new rule recognizes that a number of professionals in other health-related disciplines are licensed to perform physical and mental examinations and therefore the designation "licensed professional" is substituted for "physician." The new language was adopted to effectuate the objectives of the rule with minimal judicial involvement. The requirement of "good cause" was therefore eliminated as grounds for seeking an examination.

Timing is the critical consideration. Examining professionals under the rule fall within the classification of opinion witnesses under Supreme Court Rule 213(g) as opposed to consultants under Supreme Court Rule 201(b)(3). Consequently, the rule has been amended to require that the examination be scheduled in order that the report contemplated by subsection (c) is provided in accordance with the deadlines imposed by Supreme Court Rule 218(c). In addition, the failure to provide the attorney for the party who was examined with a copy of the examiner's report within the 21-day period specified by paragraph (c) will result in exclusion of the examiner's testimony, opinions, and the results of any tests or X-rays that were performed.

Supreme Court Rule 215 is the compilation of rules previously and independently suggested by the Illinois Judicial Conference Committee on Discovery Procedures and the Supreme Court Rules Committee. The new rule allows for physical and mental examinations of "licensed professionals" and not merely physicians. The contemplated circumstances include sociologists, psychologists or other licensed professionals in juvenile, domestic relations and child custody cases. The Committee feels that this will aid not only in the previously designated cases but in other circumstances where it may become necessary for such a "professional" to be utilized. In particular, smaller counties have had difficulty in finding psychiatrists because of their limited number and lack of availability. This rule should help to alleviate this problem. The requirement of "good cause" for seeking such an examination was eliminated from the rule. In addition, the reference to the Illinois State Medical Society has been stricken, and the Administrative Office of the Illinois Courts has been substituted in its place.

COMMITTEE COMMENT TO 2002 AMENDMENT

This rule is amended to conform to the changes in terminology made in Supreme Court Rule 213.

Case Notes

CONSTITUTIONALITY

APPLICABILITY

--FOREIGN COURTS

BLOOD TEST

--IN GENERAL

--AUTHORITY AND REQUIREMENTS

--COURT ORDER

--DISCOVERY RULES

--DISCRETION OF COURT

--PATERNITY ACTION

BURDEN OF PROOF

CONSTITUTIONAL CHALLENGE

CONTEMPT

Ill. Sup. Ct., R 215

IL State Rules and Local Federal Rules reflect changes received through June 15, 2016

Illinois Court Rules > ILLINOIS SUPREME COURT RULES > ARTICLE II. RULES ON CIVIL PROCEEDINGS IN THE TRIAL COURT > PART E. DISCOVERY, REQUESTS FOR ADMISSION, AND PRETRIAL PROCEDURE

Rule 215. Physical and Mental Examination of Parties and Other Persons

Notice; Motion; Order. In any action in which the physical or mental condition of a party or of a person in the party's custody or legal control is in controversy, the court upon notice and on motion made within a reasonable time before the trial, may order such party to submit to a physical or mental examination by a licensed professional in a discipline related to the physical or mental condition which is involved. The motion shall suggest the identity of the examiner and set forth the examiner's specialty or discipline. The court may refuse to order examination by the examiner suggested but in that event shall permit the party seeking the examination to suggest others. A party or person shall not be required to travel an unreasonable distance for the examination. The order shall fix the time, place, conditions, and scope of the examination and designate the examiner. The party calling an examiner to testify at trial shall disclose the examiner as a controlled expert witness in accordance with these rules.

Examiner's Fee and Compensation for Loss of Earnings. The party requesting the examination shall pay the fee of the examiner and compensation for any loss of earnings incurred or to be incurred by the party or person to be examined in complying with the order for examination, and shall advance all reasonable expenses incurred or to be incurred by the party or person in complying with the order.

Examiner's Report. Within 21 days after the completion of the examination, the examiner shall prepare and mail or deliver to the attorneys for the party requesting the examination and the party examined duplicate originals of a written report of the examination, setting out the examiner's findings, results of all tests made, and the examiner's diagnosis and conclusions. The court may enforce compliance with this requirement. If the report is not delivered or mailed to the attorney for the party examined within the time herein specified or within any extensions or modifications thereof granted by the court, neither the examiner's report, the examiner's testimony, the examiner's findings, X-ray films, nor the results of any tests the examiner has made may be received in evidence except at the instance of the party examined or who produced the person examined. No examiner under this rule shall be considered a consultant.

Impartial Medical Examiner.

Examination Before Trial. A reasonable time in advance of the trial, the court may on its own motion or that of any party, order an impartial physical or mental examination of a party where conflicting medical testimony, reports or other documentation has been offered as proof and the party's mental or physical condition is thereby placed in issue, when in the court's discretion it appears that such an examination will materially aid in the just determination of the case. The examination shall be made by a member or members of a panel of physicians chosen for their special qualifications by the Administrative Office of the Illinois Courts.

Examination During Trial. Should the court at any time during the trial find that compelling considerations make it advisable to have an examination and report at that time, the court may in its discretion so order.

Copies of Report. A copy of the report of examination shall be given to the court and to the attorneys for the parties.

273 Ill.App.3d 81
Appellate Court of Illinois,
Third District.

In re MARRIAGE OF Patsy J. ALESHIRE,
a/k/a Patsy Hurst, Petitioner-
Appellee and Cross-Appellant,
and
David A. Aleshire, Respondent-
Appellant and Cross-Appellee.

No. 3-94-0535.

June 21, 1995.

Mother and father filed cross-petitions to enforce visitation provisions of dissolution of marriage judgment. After entering visitation schedule, the 10th Judicial Circuit Court, Tazewell County, **Robert J. Cashen, J.**, ordered father to pay 40% of mother's attorney fees and ordered parties to mediate future nonemergency visitation disputes before seeking relief in court. Mother appealed. The Appellate Court, **Breslin, J.**, held that: (1) mother's threatening to withhold visitation unless father signed parental declaration did not amount to willful and unjustifiable denial of father's visitation rights; (2) father was held accountable for all fees mother incurred in bringing petition; and (3) ordering parties to submit prospective visitation issues to mediation was abuse of discretion.

Reversed and remanded.

West Headnotes (7)

[1] **Child Custody**
— Visitation

Trial court's finding that parent committed visitation abuse will not be disturbed unless it is against manifest weight of evidence. S.H.A. 750 ILCS 5/607.1(a).

1 Cases that cite this headnote

[2] **Child Custody**

76D child custody XV
Custodial interference
— Elements, Grounds, and Defenses

Mother's threatening to withhold visitation unless father signed parental declaration, which set forth several principles for divorced parents regarding proper care of their children, did not amount to willful and unjustifiable denial of father's visitation rights, in view of evidence that mother's actions stemmed from her concern about how father was treating children, rather than from intent to interfere with father's visitation rights. S.H.A. 750 ILCS 5/607.1(a).

Cases that cite this headnote

[3] **Divorce**

— Nature of proceeding as factor in general

Trial court must award attorney's fees in proceeding for enforcement of order or judgment if it finds that underlying failure to comply with order was without cause or justification; court's only discretion in this regard extends to its determination of amount of reasonable fees. S.H.A. 750 ILCS 5/508(b).

1 Cases that cite this headnote

[4] **Divorce**

— Conduct of litigation; misconduct in general

If trial court finds that both parties have failed to comply with order or judgment, court may apportion attorney's fees in proceeding for enforcement of order or judgment in manner that reflects parties' relative culpability. S.H.A. 750 ILCS 5/508(b).

1 Cases that cite this headnote

[5] **Child Custody**

— Attorney fees

Mother did not commit visitation abuse and, therefore, father was held accountable for all of fees mother incurred in bringing her petition to enforce visitation provisions of dissolution of marriage judgment. S.H.A. 750 ILCS 5/508(b).

Cases that cite this headnote

[6] Alternative Dispute Resolution

➔ Compulsory mediation; mediation as condition precedent

Under Marriage and Dissolution of Marriage Act, trial court may order mediation in cases of visitation abuse only after assessing whether mediation would be useful in resolving specific dispute before court. S.H.A. 750 ILCS 5/607.1(c)(4).

1 Cases that cite this headnote

[7] Alternative Dispute Resolution

➔ Compulsory mediation; mediation as condition precedent

Marriage and Dissolution of Marriage Act does not authorize trial courts to order mediation of prospective visitation disputes. S.H.A. 750 ILCS 5/607.1(c)(4).

1 Cases that cite this headnote

Attorneys and Law Firms

****384 ***844 Michael A. Fleming**, Cusack Fleming, P.C., Peoria, for David A. Aleshire.

***81 John A. Bernardi** (argued), Pekin, for Patsy J. Aleshire.

Opinion

***82** Justice **BRESLIN** delivered the opinion of the court:

The petitioner, Patsy Hurst, and the respondent, David Aleshire, filed cross-petitions to enforce the visitation provisions of a dissolution of marriage judgment. After entering a visitation schedule, the circuit court ordered David to pay 40% of Patsy's attorney fees and ordered the parties to mediate future nonemergency visitation disputes before seeking further relief in court. Patsy assigns error to the attorney fee and mediation rulings as well as to the trial court's finding that she interfered with David's visitation rights. We reverse.

David has not filed an appellee's brief. We find, however, that the record is sufficiently simple to allow proper review of the merits. See *In re Marriage of Vanderpool* (1994), 261 Ill.App.3d 312, 199 Ill.Dec. 411, 634 N.E.2d 11.

When the parties divorced in 1989, they entered into a written settlement agreement which was incorporated into the dissolution judgment. By the terms of the agreement, Patsy became the custodian of the parties' two minor children and David was entitled to reasonable visitation. In addition, David assumed ****385 ***845** responsibility for the children's medical expenses that were not covered by insurance.

The parties subsequently experienced problems regarding visitation and payment of the children's medical expenses. Patsy's attorney informed David that Patsy would not allow him future visitation unless he signed a "Parental Declaration," which set forth several principles for divorced parents regarding the proper care of their children. David was further asked to sign various insurance forms relating to the children's medical expenses. David refused to sign the parental declaration or otherwise meet Patsy's requests.

In November 1993, Patsy filed an amended petition to enforce the settlement agreement's provisions. Count I alleged that David demanded visitation with little or no notice to Patsy and made disparaging comments about Patsy while exercising visitation. Count II alleged that David refused to reimburse Patsy for the children's medical expenses. Count III alleged that David interfered with Patsy's attempts to schedule ear surgery for one of the children and refused to give Patsy an insurance card which was needed to obtain medical insurance benefits.

In response to Patsy's petition, David filed a cross-petition alleging that Patsy engaged in visitation abuse by conditioning visitation upon David's adherence to the parental declaration.

The court found that David's actions were "improper throughout" and thus found for Patsy on all three of her counts. It also found, however, that Patsy interfered with David's visitation rights. After entering a visitation schedule, the court ordered David to reimburse Patsy for medical expenses, to cooperate with Patsy in obtaining insurance ***83** benefits, and to pay 40% of the legal fees Patsy incurred in bringing her petition. In addition, the court ruled that the parties were to seek mediation of

future nonemergency visitation issues before seeking relief in the circuit court. Patsy appeals.

The first issue we address is whether the trial court's finding that Patsy interfered with David's visitation rights was against the manifest weight of the evidence.

[1] [2] Section 607.1 of the Illinois Marriage and Dissolution of Marriage Act (Act) provides that visitation abuse occurs when a party has willfully and without justification denied another party visitation as set forth by the court. (750 ILCS 5/607.1(a) (West 1992).) A trial court's finding that a party committed visitation abuse will not be disturbed unless it is against the manifest weight of the evidence. Cf. *Pryweller v. Pryweller* (1991), 218 Ill.App.3d 619, 628, 161 Ill.Dec. 884, 891, 579 N.E.2d 432, 439 (manifest weight standard applied to finding of contempt).

The trial court found that Patsy committed visitation abuse by threatening to withhold visitation unless David signed the parental declaration. We agree with the trial court that Patsy was not in a position to impose this condition upon David's visitation rights. The record, however, shows that Patsy's actions stemmed from her concern about how David was treating the children, rather than from an intent to interfere with David's rights. In addition, there is no evidence in the record that Patsy actually denied David an opportunity to visit the children based upon his failure to sign the document. Therefore, we hold that Patsy's conduct did not amount to a willful and unjustifiable denial of David's visitation rights.

[3] The next issue is whether the trial court abused its discretion by ordering David to pay only 40% of the attorney fees Patsy incurred in bringing her petition.

Section 508(b) of the Act provides:

"In every proceeding for the enforcement of an order or judgment when the court finds that the failure to comply with the order or judgment was without cause or justification, the court shall order the party against whom the proceeding is brought to pay the costs and reasonable attorney's fees of the prevailing party."

(750 ILCS 5/508(b) (West 1992).)

A trial court must award fees under section 508(b) if it finds that the underlying failure to comply with an order was without cause or justification. (**386 ***846 *In re Marriage of Sanda* (1993), 245 Ill.App.3d 314, 184 Ill.Dec. 186, 612 N.E.2d 1346.) The court's only discretion in this regard extends to its determination of the amount of reasonable fees. *Sanda*, 245 Ill.App.3d at 319, 184 Ill.Dec. at 189, 612 N.E.2d at 1349.

[4] [5] The trial court ordered David to pay 40% of Patsy's legal fees *84 after finding that David's conduct was improper and that Patsy interfered with David's visitation rights. Where a trial court finds that both parties have failed to comply with an order or judgment, we think it is appropriate under section 508(b) for the court to apportion attorney fees in a manner that reflects the parties' relative culpability. Here, however, we have found that Patsy did not commit visitation abuse. Therefore, David must be held accountable under section 508(b) for all of the fees Patsy incurred in bringing her petition.

The final issue is whether the trial court abused its discretion by ordering the parties to submit to mediation to resolve future nonemergency visitation issues before seeking relief in court.

We have found no statutory or common law authority for a trial court to order mediation of prospective visitation disputes in the absence of a preliminary finding that the issues in question are proper for mediation. The trial court does have authority to order mediation in certain instances; however, a review of this authority shows that it does not contemplate the ordering of prospective mediation.

[6] [7] Section 607.1 of the Act grants trial courts the authority to order mediation in cases of visitation abuse, but only after the court hears all of the evidence in the case. (750 ILCS 5/607.1(c)(4) (West 1992).) We interpret the language "after hearing all of the evidence" to mean that the trial court may order mediation only after assessing whether mediation would be useful in resolving a specific dispute before the court. Therefore, section 607.1 does not authorize trial courts to order mediation of prospective visitation disputes.

Apart from statutory authority, some judicial circuits provide for mediation by local rule, apparently pursuant to their inherent authority to regulate their dockets and calendars. (See *In re Marriage of Jackson* (1994), 259 Ill.App.3d 538, 197 Ill.Dec. 626, 631 N.E.2d 848.) Such rules typically give trial courts broad discretion to order mediation, but only after an initial determination that it would be in the parties' best interests or that mediation would be appropriate in solving a particular problem. (See, e.g., 11th Jud.Cir.R. 105(c) (eff. April 8, 1994); 18th Jud.Cir.Rules 15.18(a), (c) (Conciliation Program) (eff. May 10, 1993).) Thus, like section 607.1, the local rules include preliminary safeguards which are designed to ensure that mediation resources are not expended in cases where they might prove to be counterproductive.

In light of the safeguards imposed by statute and local rule, we find that the trial court abused its discretion

by ordering the parties to submit prospective visitation issues to mediation. If the parties experience *85 a future visitation dispute, the trial court must first ascertain the nature of the dispute to determine whether mediation might be useful to resolve the problem.

For the foregoing reasons, we reverse the judgment of the circuit court of Tazewell County and remand for further proceedings consistent with this order.

Reversed and remanded.

LYTTON and McCUSKEY, JJ., concur.

All Citations

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Lead Article

HEARSAY STATEMENTS OF ABUSED CHILDREN IN ORDER OF PROTECTION
CASES: AN ANALYSIS OF ALTERNATE STATUTORY INTERPRETATIONS

Thomas A. Else^{a1}

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A common issue in order of protection cases involving abused children is the admissibility of their hearsay statements. There are three statutes in Illinois which address this issue and two appellate cases, one from the second district and one from the first district, which mandate different outcomes insofar as whether or not a reliability hearing has to take place before hearsay statements can be admitted, and what constitutes sufficient corroboration of hearsay statements. Until either the Legislature or the Supreme Court clarifies these matters, it is important to become conversant in the alternate analysis made by the different courts, and which statute to apply.

In an order of protection case, there are three statutes which provide for the admission of hearsay statements. These are: (a) Section 213.1 of the Illinois Domestic Violence Act of 1986,¹ (b) Section 606(e) of the Illinois Marriage and Dissolution of Marriage Act,² or (c) Section 8-2601 of the Code of Civil Procedure.³ In determining which section to apply, the tension between Appellate Courts has focused on whether to apply Section 606(e) of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) or Section 8-2601 of the Code of Civil Procedure. Section 606(e) of the IMDMA provides, in relevant part, as follows:

(e) Previous statements made by the child relating to any allegations that the child is an abused or neglected child within the meaning of the Abused and Neglected Child Reporting Act, or an abused or neglected minor within the meaning of the Juvenile Court Act of 1987, shall be admissible in evidence in a hearing concerning custody of or visitation with the child. No such statement, however, if uncorroborated and not subject to cross-examination, shall be sufficient in itself to support a finding of abuse or neglect.

Section 8-2601(a) of the Code of Civil Procedure provides, as follows:

(a) An out-of-court statement made by a child under the age of 13 describing any act of child abuse or any conduct involving an unlawful sexual act performed in the presence of, with, by, or on the declarant child, or testimony by such of an out-of-court statement made by such child that he or she complained of such acts to another, is admissible in any civil proceeding, if: (1) the court conducts a hearing outside the presence of the jury and finds that the time, content, and circumstances of the statement provide sufficient safeguards of reliability; and (2) the child either: (I) testifies at the proceeding; or (ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

In the second district case of In re Marriage of Flannery⁴ the court was required to decide whether to apply the relevant statutory provisions of the IMDMA or the Code of Civil Procedure to hearsay statements made by a 3 year old in an

order of protection case. The trial court in that case had admitted the child's out-of-court statements under Section 606(e) of the IMDMA. The respondent contended that Section 8/2601 was properly applied to the admissibility of the minor's hearsay statements and that the trial court erred in failing to conduct a hearing to establish the reliability of the statements and had not determined whether or not corroborative evidence of the child's statements were reliable. The appellate court concluded after a review of the statutory provisions that Section 8/2601 applied in determining the admissibility of the child's out-of-court statements of sexual abuse by the respondent.⁵ The Court found that the Domestic Violence Act governs orders of protection and that Section 205(a) of that Act provides in pertinent part:

Any proceeding to obtain, modify, reopen or appeal an order of protection, whether commenced alone or in conjunction with a civil or criminal proceeding, shall be governed by the rules of civil procedure of this State. The standard of proof in such a proceeding is proof by a preponderance of the evidence, whether the proceeding is heard in criminal or civil court. The Code of Civil Procedure [(735 ILCS 5/10191 et seq. (West 2000))] and Supreme Court and local rules applicable to civil proceedings, as now or hereafter amended, shall apply, except as otherwise provided by this law." (Emphasis added). 750 ILCS 60/205(a) (West 2000).⁶

Applying rules of statutory construction the second district found that the plain language of Section 205(a) mandated the application of Section 8/2601. The court found that in certain circumstances certain provisions of the IMDMA could overlap into domestic violence cases and arguably provide a basis for the use of Rule 606(e), but found that none of those seven sub-sections applied to the case before it nor have any subsequent appellate cases made those sections applicable.⁷

The court went on to opine that while both of the relevant statutory provisions require corroboration, Section 8/2601 of the Code requires the court to conduct a hearing and find sufficient *indicia* of reliability.⁸ Citing the United States Supreme Court case of *Idaho v. Wright*, the court pointed out that the "indicia of reliability" requirement may be met (1) where the statement falls in a *15 "firmly rooted hearsay exception" or (2) where it is supported by "a showing of particularized guarantees of trustworthiness." Since the trial court in *Flannery* found that the child's statements were admissible under Section 606(e) which does not require the trial court to conduct a reliability hearing, the appellate court found that it followed that the trial court did not consider whether the "time, content, or circumstances of the statement(s) provides sufficient safeguards of reliability" as required by Section 8/2601 of the Code.⁹ The court noted that ordinarily it would remand the proceeding so that the trial court could hold a reliability hearing, however, as it went on to analyze whether or not the hearsay statements were properly corroborated, it came to the conclusion that since the child's hearsay statements lacked corroboration, a remand would be unnecessary. The court cited the Illinois Supreme Court's standards for corroborating evidence of abuse or neglect. In the case of *In re A.P.*¹⁰ the Supreme Court Stated:

corroborating evidence of * * * abuse or neglect requires there to be independent evidence which would support a logical and reasonable inference that the act of abuse or neglect described in the hearsay statement occurred. In essence, corroborating evidence is evidence that makes it more probable that a minor was abused or neglected. The form of the corroboration will vary depending on the facts of each case and can include physical or circumstantial evidence. *A.P.* 179 Ill.2d at 199.¹¹

After applying the guidelines from *A.P.* to the facts in *Flannery*, the court found insufficient corroboration -- that is, hearsay cannot corroborate hearsay.¹² The appellate court reversed the finding of the lower court.

In the case of *In re Marriage of Gilbert*, the first district took up virtually the same issue.¹³ In *Gilbert*, the first district found that although the relief sought in the petition for order of protection referred to the Domestic Violence Act, the court's ruling implicated questions of custody and visitation and therefore Section 606(e) of the IMDMA would apply.

The court also considered important the fact that the petition was brought before the lower court under the name and title of the original dissolution petition.¹⁴

It was argued by the Petitioner in Flannery that while she did not seek “temporary legal custody” she did request “physical care” and equated “physical care” with the term “temporary legal custody” as found in Section 214(b)(6) of the Domestic Violence Act, which, the Petitioner argued meant that the trial court in that case correctly applied Section 606(e) of the IMDMA. The court in Flannery decided that “physical care” and “temporary legal custody” mean two different things because Section 214(b)(5) of the Domestic Violence Act expressly provides that, in issuing an order of protection, a court may award “physical care and possession of the minor child.” as distinguished from Section 214(b)(6) of the same Act and section which provides for the remedy of “temporary legal custody.”¹⁵

If the petitioner in Flannery had used the magic words “temporary legal custody,” does that mean the court in that case would *16 have considered the issue to be primarily pursuant to the IMDMA and applied Section 606(e)? A fair reading of that case indicates that the result would have been the same regardless. Notable is the fact that while the appellate court found that the legislature thought that “physical care and possession” and “temporary legal custody” mean two different things, the court never went on the spell out what those two different things are. The court in Gilbert went to find that it was not error for the trial court in that case to fail to conduct a reliability hearing, and found that not only does Section 606(e) of the IMDMA not require such a hearing, that Section 8/2601 does not require a reliability hearing either if there is a bench trial. The First District stated:

Even if such a hearing was required in jury cases, in a bench trial the trial judge is presumed to have considered the time, content and circumstances under which the statement was made in determining the reliability of the statements.¹⁶

In sum, the First District found that corroboration “will vary depending on the facts of each case and can include physical or circumstantial evidence” citing In re A.P. and that many kinds of corroboration can be used to allow the admission of hearsay statements, unlike the stricter standard set forth by the Second District in Flannery.¹⁷ In commenting on Flannery, Gilbert stated:

A recent case would suggest a different outcome. In *In re Marriage of Flannery*, (citations omitted) the court determined that merely observing the physical evidence of the child's hearsay statements of sexual abuse, such as using puppets or other “games,” was insufficient to provide corroboration under any of the operative statutes. The statements relating to observation of the child were also hearsay. If the *Flannery* case is bedrock precedent, it would be almost impossible to obtain a finding of sexual abuse unless there was some physical evidence on the body of the child or unless the abuser had other witnesses to his abuse, a matter that is certainly unlikely.¹⁸

The appellate court in Gilbert affirmed the ruling of the trial court. The unanswered question in either of these cases involves the following:

If the petitioner in Flannery has asked for temporary legal custody of the children or the court would have applied the standards of the IMDMA and utilized Section 606(e)? It appears that the appellate court would not have taken that position even in that event since, as previously pointed out, it failed to make any particular distinction of its own between “temporary legal custody” or “physical care.” On the other hand, it is apparent that the first district would never apply Section 8/2601 in any meaningful way to an order of protection hearing since such hearings are always bench trials. As with many other matters in the domestic relations area, it is important for lawyers to be keenly aware of where they are litigating, and what rules and standards to apply.

Footnotes

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1 750 ILCS 60/213.1

2 750 ILCS 5/606(e)

3 735 ILCS 5/8-2601

4 328 Ill. App. 3d 602, 768 N. E. 2d 34 (2d Dist., 2002)

5 328 Ill. App. 3d at 606

6 328 Ill. App. 3d at 606

7 328 Ill. App. 3d at 606-607

8 328 Ill. App. 3d at 608

9 328 Ill. App. 3d at 609, citing 497 U.S. 805, 111 L. Ed 2d 638, 110 S. Ct. 3139 (1990)

10 328 Ill. App. 3d at 610, citing 179 Ill. 2d 184 (1997)

11 328 Ill. App. 3d at 610

12 328 Ill. App. 3d at 614

13 355 Ill. App. 3d 104, 822 N. E. 2d 116 (1st Dist., 2004)

14 355 Ill. App. 3d at 112

15 328 Ill. App. 3d at 607

16 355 Ill. App. 3d at 112

17 328 Ill. App. 3d at 614

18 355 Ill. App. 3d at 114

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RULE 804.**HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE**

(a) Definition of Unavailability. "Unavailability as a witness" includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. Testimony given as a witness (A) at another hearing of the same or a different proceeding, or in an evidence deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination, or (B) in a discovery deposition as provided for in Supreme Court Rule 212(a)(5).

(2) Statement Under Belief of Impending Death. In a prosecution for homicide, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of Personal or Family History.

(8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) Presumptions Under Statutes. Any signature, document, or other matter declared by statutes to be presumptively or prima facie genuine or authentic.

(11) Certified Records of Regularly Conducted Activity. The original or a duplicate of a record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by a written certification of its custodian or other qualified person that the record

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

The word "certification" as used in this subsection means with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a record maintained or located in a foreign country, a written declaration signed in a country which, if falsely made, would subject the maker to criminal penalty under the laws of the country. A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

[Adopted September 27, 2010, eff. January 1, 2011.](#)

Rule 903.

SUBSCRIBING WITNESS' TESTIMONY UNNECESSARY

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

[Adopted September 27, 2010, eff. January 1, 2011.](#)

ARTICLE X

CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Rule 1001.

DEFINITIONS

For purposes of this article the following definitions are applicable:

(1) Writings and Recordings. “Writings” and “recordings” consist of letters, words, sounds, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. “Photographs” include still photographs, X-ray films, video tapes, motion pictures and similar or other products or processes which produce recorded images.

(3) Original. An “original” of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An “original” of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original.”

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(4) Duplicate. A “duplicate” is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

[Adopted September 27, 2010, eff. January 1, 2011.](#)

Rule 1002.

REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute.

[Adopted September 27, 2010, eff. January 1, 2011.](#)

Rule 1003.

ADMISSIBILITY OF DUPLICATES

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.